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MAR 8 1963
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 805

THE FIRST NATIONAL BANK OF MEMPHIS,
Petitioner,

vs.

THE AETNA CASUALTY AND SURETY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The District Court for the Western District of Tennessee rendered no opinion, as such, but did make written Findings of Fact and Conclusions of Law (R. 56a, 57a, 59a). These are not officially reported.

The judgment of the Court of Appeals for the Sixth Circuit was rendered November 19, 1962, and while petitioner states in the Petition for Certiorari that the opinion of the Court of Appeals has not been published, it has been published and is found reported at 309 F. 2d 702 (Advance Sheets issue of January 7, 1963, 309 F. 2d, Vol. 5).

QUESTIONS PRESENTED.

In respondent's opinion, the statement of the questions presented for review, found at page 4 of the Petition for Certiorari, is neither a fair nor an adequate presentation of the questions.

Petitioner's Question I is not involved here and was not involved below.

While petitioner's Questions II, III, IV and V are involved, they are not adequately nor clearly stated. The questions presented for review may more properly be phrased as follows:

Question I.

Where Milling Company obtained loans from petitioner Bank on pledge of worthless warehouse receipts (reciting storage of beans when no beans were in storage), and later sold receipts to Grain Company, using proceeds of sale to pay loans to petitioner Bank, and Grain Company thereupon sued petitioner Bank and Milling Company's trustee in bankruptcy for rescission and sought to hold petitioner Bank as constructive trustee, and Milling Company's trustee in bankruptcy also sued petitioner Bank to recover alleged voidable preference, had petitioner Bank lost either of such suits, would its payment of judgment, which would have otherwise constituted a loss under false pretenses clause of Bankers Blanket Bond, have been excluded as such a loss under Exclusion Clause 1 (d), excluding from coverage "Any loss, the result of the complete or partial non-payment or of default upon any loans made by or obtained from the Insured, whether procured in good faith or through trick, artifice, fraud or false pretenses."

Question II.

Would the payment by petitioner Bank of a judgment against it in either of such suits have been a loss under

Insuring Clause (E) of such Bond indemnifying against "Any loss through the Insured's having, in good faith, and in the course of business . . . extended any credit . . . on the faith of, . . . any securities, documents, or other written instruments which proved to have been counterfeited or forged as to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor, or as to the signature of any person signing in any other capacity, . . .", where, even though there were no beans in warehouse to support the receipts upon the pledge of which petitioner Bank made loans, the warehouse receipts were signed and issued on behalf of the Elevator Company by its duly authorized officers and were endorsed by duly authorized officers on behalf of the Milling Company to whom they were issued and by whom they were pledged to petitioner Bank. As a collateral question, were such receipts counterfeited?

Question III

Even assuming that payment of a judgment against petitioner Bank in either of such suits would constitute a loss covered under some provision of the Bond had Grain Company or trustee in bankruptcy successfully prosecuted suit against petitioner Bank, could petitioner Bank fasten liability on Surety for amount paid to defendant and settle such suits where petitioner Bank's liability had not been judicially established in either of the suits against it by Grain Company and trustee, or in suit brought by, if against surety on bond and where it appeared that petitioner Bank's controlling reasons for settlement of suits against it were not considerations of liability nor the clear and present danger of liability, but other considerations such as the amount of settlement being less than the interest earned by use of the money sued for, the desire to relieve the Bank's officers of the necessity of spending

their time on the litigation and permit them to return to their banking duties, and the avoidance of publicity; and where as part of settlement petitioner Bank released any claim against bankrupt Milling Company's trustee in bankruptcy, thereby destroying surety's right of subrogation, should it be required to reimburse petitioner Bank for alleged loss?

Question IV.

Where Bankers Blanket Bond provides that surety will indemnify petitioner Bank for attorneys fees and court costs incurred and paid in defending suit against petitioner Bank to enforce petitioner Bank's alleged liability on account of any loss "which, if established against Bank, would constitute a valid loss under Bond", is surety liable for such fees and expenses where it is ultimately held in suit on Bond that liability alleged in suits against petitioner Bank were not covered by Bond?

STATUTES AND REGULATIONS.

Petitioner, at pages 6 and 7, states that certain statutes are involved in this matter. Three of the statutes referred to deal with banks insured by the Federal Deposit Insurance Corporation and with national banks. These statutes are in no way involved in this suit or the matters presented by the Petition. They have not heretofore been referred to or relied upon, and no question has been raised under them.

The petitioner states also that 11 U. S. C. section 96; U. S. C. A. section 96, Preferred Creditors, is involved. This is part of the Bankruptcy Act and sub-section (b) is only indirectly involved in that it was under this sub-section that the trustee in bankruptcy sought to recover an alleged voidable preference from petitioner Bank.

STATEMENT.

The petitioner Bank made loans to Butler-Foster Milling Company which, on November 18, 1954, amounted in the aggregate to $3,000,000, secured by negotiable warehouse receipts for soybeans issued to Butler-Foster Milling Company by Alabama Grain Elevator Company, which, were signed in behalf of the warehouseman by its duly authorized officers and endorsed in behalf of Butler-Foster by duly authorized officers. One Landon V. Butler was the controlling stockholder, president, and director of both Butler-Foster and Alabama Grain. Butler-Foster paid petitioner the amount of the loans from the proceeds of sale of the soybeans described in the warehouse receipts, which it sold to Continental Grain Company. Shortly after the sale, Continental discovered that the soybeans described in the warehouse receipts were nonexistent and that both Butler-Foster and Alabama Grain were insolvent. Bankruptcy of Butler-Foster and Alabama Grain ensued promptly. Continental brought an action against petitioner and the trustee in bankruptcy for Butler-Foster to rescind the sale and to recover from petitioner the amount Butler-Foster paid to it on the loans, claiming that petitioner had received the money as a constructive trustee. The trustee in bankruptcy filed a cross-claim against petitioner to recover the money on the theory that the payment to petitioner constituted a voidable preference under the Bankruptcy Act. Petitioner successfully defended the action brought against it by Continental, and Continental noted an appeal. The trustee's action was reserved for later trial. While Continental's appeal was pending, and before the trustee's action was tried, petitioner paid the trustee $650,000 to procure the dismissal of his actions and Continental's appeal. Of this amount, Continental was directly paid $150,000 and the trustee $500,000. In addition to these

payments, petitioner paid $190,000 for attorneys fees and $13,859.95 for miscellaneous expenses in defending these suits. As part of petitioner's settlement with the trustee, petitioner waived its right to file any claim against the bankrupt estate of Butler-Foster. Following this petitioner Bank brought this action against respondent in the District Court for the Western District of Tennessee, Western Division (R. 4a) seeking to recover, as a loss under the Bond, the payment of $650,000 which it had made to settle the three actions brought against it, and the additional monies that it had paid by way of attorneys fees and expenses in defending these actions up until the settlement thereof, alleging alternately that the payment of the $650,000 in settlement of the actions was a loss sustained by it under Insuring Clause (B) or, if not under Insuring Clause (B), then Insuring Clause (D), or if not under Insuring Clause (D), then under Insuring Clause (E) of a Bankers' Blanket Bond, Standard Form No. 24, issued to it by respondent (Ex. A; R. 98a, 100a, 102a, 103a, 104a).

ARGUMENT IN OPPOSITION TO GRANTING OF PETITION FOR CERTIORARI

I. Petitioner's Identity as National Bank Is Not Relevant.

Petitioner seeks to convince the Court that because petitioner is a national bank, the Court should take jurisdiction of this cause, and for this reason claims in the Petition that certain national bank and Federal Deposit Insurance Corporation statutes are involved. The fact that petitioner is a national bank does not raise any question under federal laws in this litigation; neither does it constitute any reason for the granting of certiorari.

This action involves a private contract between private parties. The Bankers Blanket Bond, Standard Form No. 24, is a standard form of contract which has been worked out between the Surety Association of America and the American Bankers Association which has been designed for use in all of the states, and it is so used by banks in every state in the United States, be they national or state banks. While uniformity of construction of the provisions of the bond is to be desired, the law of Tennessee—not federal law—governs with respect to its nature, its obligation, and the interpretation of its terms insofar as the instant case is concerned. It should require the citation of no authority to sustain this proposition.

Even though this Court has not construed the specific provisions of the bond which are relied on by petitioner, it has laid down the rule of construction by which the rights and liabilities of the parties to an insurance contract must be determined. The rule adhered to by this court, and by the overwhelming majority of the courts in this country, is that, in determining the rights and liabilities of parties

to an insurance contract, the words used to express the intention of the parties are to be given their usual, natural, and ordinary meaning. **Bergholm v. Peoria Life Insurance Co.**, 284 U. S. 489, 52 S. Ct. 230.

Petitioner's position in this respect is not substantial.

II. Decision of the Court of Appeals Is Not in Conflict With Any Local Law.

In its Petition, particularly under its second Question, petitioner argues that its payment to the trustee was a loss covered by Insuring Clause (B) of the bond, indemnifying against loss through false pretenses and that it was not excluded under Exclusion Section 1 (d) as the result of the partial or complete non-payment of or default upon, a loan, because the bankrupt Milling Company had actually paid its loans to the Bank. It argues that the decision of the Court of Appeals is in conflict with certain decisions of the Tennessee courts defining the word, "payment." There is no conceivable conflict in the opinion of the Court of Appeals with these Tennessee cases. They do not, in any sense, deal with the situation presented here, and they simply attempt to define "payment" in the abstract sense. The opinion of the Court of Appeals was simply that, even though the bankrupt Milling Company had paid its loans to the Bank with the proceeds from the sale of the worthless warehouse receipts, that payment would have been rescinded had the Grain Company been successful in its suit for rescission, and it would have been rescinded had the Milling Company's trustee in bankruptcy been successful in his suit to recover an alleged voidable preference from the petitioner Bank. The Court of Appeals held that, had these things happened, petitioner Bank would have been restored to its status as an unpaid creditor of the bankrupt Milling Company, and held fur-

ther that, under these circumstances, the petitioner Bank's loss would have resulted from non payment of the Milling Company's loans. It went the next step and held that the money paid by the petitioner Bank in settlement of those suits had the same characteristics as payment of a judgment in those suits had the Bank lost them and, that to the extent the Bank paid money in settling the suits, it was restored to the status of a creditors of the bankrupt Milling Company. This holding can, in no sense, constitute a conflict with the Tennessee decision abstractly defining "payment" and petitioner's argument here is not substantial.

III There Is No Conflict Between Decisions of Courts of Different Circuits.

Petitioner does not contend that there is any conflict between the decisions of any of the Courts of Appeals for the various Circuits insofar as the questions dealing with alleged coverage under Insuring Clause (B) and its exclusion by Exclusion Clause 1 (d) are concerned. It does contend that there is a conflict between the opinion of the Court of Appeals for the Sixth Circuit in this case and that of the Court of Appeals for the Third Circuit in **Fidelity Trust Co. v. American Surety Co.**, 268 F. 2d 805, dealing with alleged coverage under Insuring Clause (E).

The specific holding of the Sixth Circuit in this case is as follows:

> "Finally, it is claimed that coverage was afforded under Insuring Clauses (D) and (E). In our opinion, the warehouse receipts were not forged or counterfeited. They were signed and issued by the elevator company and endorsed by Butler Foster, all by duly authorized officers. Falsity lies in the representation of facts contained in the warehouse certificates and

not in the genuineness of their execution. In common parlance, the warehouse certificates would not be considered as forged or counterfeited and certainly not at common law or under the statutes of Alabama or Tennessee. **Gilbert v. United States**, 370 U. S. 650; **Marteney v. United States**, 216 F. 2d 760 (C. A. 10); **The First National Bank of South Carolina of Columbia v. Glen Falls Insurance Co.**, 304 F. 2d 866 (C. A. 4); **State Bank of Poplar Bluff v. Maryland Casualty Co.**, 289 F. 2d 544 (C. A. 8); **United States Fidelity & Guaranty Co. v. First National Bank of Ft. Morgan** (Colo., 1961), 364 P. 2d 202; **Mallory v. State**, 179 Tenn. 617; **Harris v. State**, 19 Ala. App. 484; **Williams v. State**, 33 Ala. App. 119."

Petitioner has abandoned its claim of coverage under Insuring Clause (D), presumably because it realized it could find no basis for a claim that there was any conflict between decisions of the various Circuit Courts of Appeal, but, as stated, seeks to show that there is some conflict with respect to Insuring Clause (E).

In **Fidelity Trust Co. v. American Surety Co.**, 268 F. 2d 865, the court held that fraudulent invoices for goods and services, purporting to show a sale of such goods and services to customers, and assigned to the bank as security for loans, which bore no signatures of the purported customers, were counterfeited written instruments within the meaning of Insuring Clause (E) of the bond. In reaching its decision, the court held that "counterfeited" did not refer to the signature, and it went on to hold that fraudulent invoices made up, by the borrower, when in fact no sales had been made, came within the term "counterfeited" as used in the bond.

It is not necessary, at this point, to argue the validity of that decision in any respect. The factual situation there

was completely different from that here. The warehouse receipts in the instant case were the original genuine warehouse receipts issued under the Uniform Warehouse Receipts Act of Alabama, and signed by persons authorized to issue and sign them, were completely valid instruments and not in any sense counterfeit. That is what the Court of Appeals for the Sixth Circuit has held and that is what the District Court held. The essence of the **Fidelity** decision dealt with the syntax in Insuring Clause (E), simply holding that the word, "counterfeit", was not limited by the words, "as to signature". The Court of Appeals did not reach that question in the instant case. It simply held that regardless of that question, the warehouse receipts were not counterfeited instruments.

There is a conflict between the Circuits with respect to the holding of the Third Circuit in **Fidelity Trust Co. v. American Surety Co.**, 268 F. 2d 805. The Fourth Circuit reached exactly the opposite result in **First National Bank of South Carolina of Columbia v. Glens Falls Insurance Co.**, 304 F. 2d 866, reversing the District Court (197 F. Supp. 264). That, however, does not represent a conflict between the Circuits as to the question actually decided by the Court of Appeals for the Sixth Circuit in the instant case. That decision, as pointed out, was simply that the warehouse receipts were not counterfeit instruments and that holding does not, in any sense, conflict with any other opinion of any Circuit. Instead, it directly follows the holding of this Court in **Gilbert v. United States**, 370 U. S. 650, 82 S. Ct. 1572, 8 L. Ed. 801, decided after the decision in **Fidelity**, to the effect that where the falsity of an instrument lies in the representation of facts contained in the instrument and not in the genuineness of its execution, it is not a counterfeit or a forgery. Indeed, the Third Circuit has reached this same result since the decision in **Fidelity**. See **United States v. Carabas**, 292 F. 2d 362. It seems clear,

therefore, that there is no conflict between the Circuits with respect to the actual holding of the Sixth Circuit in the instant case.

In conclusion, it is submitted that in spite of petitioner's arguments as to the identity of petitioner as a national bank and the claimed importance of this Court taking the case for that reason, there is no public interest in the questions involved here. Bonds such as that involved in this action are, of course, held by national banks. In addition, they are held by state banks throughout the country. The fact that petitioner is a national bank can, in no sense, affect the answer to the questions involved here. Moreover, since the questions involved here are not federal questions and do not arise under the Constitution or under any federal statute, a decision of this Court on the particular questions involved here would not be controlling in other cases, even though national banks might be involved. The fact is that the questions here involved, insofar as the interpretation and construction of the bond are concerned, must be decided under the laws of the State of Tennessee where the bond was issued. The question as to whether the warehouse receipts were counterfeit instruments must be decided under the laws of the State of Alabama where the receipts were issued and where the warehouse was located. A decision of this Court on these questions would, in no sense, control a decision on similar questions in the other jurisdictions where the bonds are in force.

There is no weight to petitioner's position in this regard, and it is submitted that petitioner here ignores the rule that any alleged conflict of opinion and authority between the Courts of Appeals must be real and embarrassing before certiorari will be granted, and also ignores the holding of this Court in **Rice v. Sioux City Memorial Park Cemetery**, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897, to the effect that only where principles are involved, the settlement of which

is of importance to the public as distinguished from the parties themselves, will this Court grant certiorari and take the case.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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